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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:	: Chapter 11
	: Case Nos. 00 B 41065 (SMB)
RANDALL'S ISLAND FAMILY GOLF	: through 00 B 41196 (SMB)
CENTERS, INC., <u>et al.</u> ,	:
	: (Jointly Administered)
Debtors.	:
	:
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OBJECTION OF DEBTORS AND DEBTORS-IN-  
POSSESSION TO MOTION OF ALL IN FUN  
ENTERPRISES, INC. FOR ORDER PURSUANT TO  
SECTION 506(b) OF THE BANKRUPTCY CODE  
COMPELLING THE PAYMENT OF POSTPETITION  
INTEREST AND LATE CHARGES

TO THE HONORABLE STUART M. BERNSTEIN,  
UNITED STATES BANKRUPTCY JUDGE:

The above-captioned debtors and debtors-in-possession (collectively, the  
"Debtors"), for their objection (the "Objection") to the Motion (the "Motion") of All In Fun  
Enterprises, Inc. ("AIF") for an order pursuant to section 506(b) of chapter 11 of title 11 of the

United States Code (the "Bankruptcy Code") compelling the payment of postpetition interest and late charges, respectfully state as follows:

#### Introduction

1. By its Motion, AIF is seeking payment of interest and late fees allegedly owing to AIF by one of the Debtors, GBGC Family Golf Centers Inc. Essentially, AIF argues that since it is supposedly oversecured, section 506(b) of the Bankruptcy Code requires that the Debtors pay to AIF postpetition interest and late fees as they come due. AIF, however, provides no statutory or factual justification for the relief requested.

2. Although section 506(b) provides that an oversecured creditor has an allowed claim for postpetition interest, neither section 506(b) nor any other provision of the Bankruptcy Code compels the Debtor to pay such interest while the chapter 11 case is pending. Moreover, there is no basis for AIF's claim that it is entitled to payment of accruing "late fees." Although late fees may be recovered by an oversecured creditor if the fees are reasonable and are not in the nature of penalty, the fees being sought are clearly unreasonable and in the nature of a penalty. Moreover, as with the claim for interest, AIF is certainly not entitled to payment of "late fees" during the pendency of these bankruptcy cases.

3. Finally, AIF's Motion is based on the mistaken and unsupported premise that AIF is oversecured. The Debtors are perfectly willing to adduce evidence showing that AIF is undersecured; that determination is premature, however, at this stage in the Debtors' chapter 11 cases, and should instead be addressed in connection with the claims resolution process.<sup>1</sup>

#### Background

4. On or about January 27, 1997, Golden Bear Golf Centers, Inc. ("Golden Bear"), the predecessor in interest to GBGC Family Golf Centers, Inc., entered into an agreement with AIF and Brian Ashley pursuant to which Golden Bear (i) purchased certain assets and

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<sup>1</sup> The Debtors reserve all of their rights and defenses with respect to the allowability and secured status of AIF's claim in general as well as the allowability of the interest, late fees and other costs sought by AIF.

improvements located in Plymouth Michigan (the "Assets"), (ii) was granted the right to lease certain real property located in Plymouth, Michigan, and (iii) was granted the right to sublease certain additional real property.

5. On March 31, 1997, Golden Bear and AIF entered into a Security Agreement that purported to grant a security interest to AIF in "All of the property, tangible and intangible, acquired by [Golden Bear] from [AIF] pursuant to that certain agreement dated January 27, 1997 between [Golden Bear], [AIF] and Brian Ashley."

6. On September 30, 1997, Golden Bear executed a promissory note to AIF in the principal amount of \$1.8 million. In July 1999, that promissory note was replaced by three substitute promissory notes in the amounts of \$800,000, \$600,000 and \$400,000 (the "Notes").

#### Argument

7. As noted above, AIF's Motion seeks to compel the Debtors to make current interest payments to AIF on the Notes and also to pay significant "late fees" on a month-by-month basis. According to AIF, since it is an oversecured creditor, it is entitled to collect the interest and "late fees" during the pendency of the Debtors' chapter 11 cases. There are three fatal defects in AIF's reasoning: 1) as a matter of law, AIF is not entitled to receive postpetition interest during the pendency of the chapter 11 case; 2) the "late fees" are an unenforceable penalty (and thus not collectible at any time); and 3) AIF is not an oversecured creditor.

8. As a matter of law, an oversecured creditor (which AIF claims to be) is not entitled to receive payment of postpetition interest during the pendency of these cases. Rather, postpetition interest is ultimately encompassed within the amount of an oversecured creditor's final claim. As one commentator explained, "[T]he secured creditor is not entitled to receive periodic payments of postpetition interest during the case while the automatic stay is in effect." Benjamin Weintraub & Alan N. Resnick, *Bankruptcy Law Manual* ¶ 5.11[4], at n.45 (4th ed. 1996). Indeed, none of the cases cited by AIF holds or even suggests that postpetition interest must be paid during the pendency of the chapter 11 case. *See, e.g., Key Bank Nat'l Assoc. v. Milham (In re Milham)*, 141 F.3d 420, 423 (2d Cir. 1998); *United States v. Ron Pair*

*Enterprises, Inc.*, 489 U.S. 235 (1989); *In re Liberty Warehouse Assocs. L.P.*, 220 B.R. 566, 548 (S.D.N.Y. 1998).

9. AIF relies upon section 506(b) of the Bankruptcy Code for its proposition that the Debtors should be compelled to pay postpetition interest and late fees. However, section 506(b) merely provides:

To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

11 U.S.C.A. § 506(b) (emphases added). Section 506(b) thus merely provides that an oversecured creditor has an allowed claim for postpetition interest, which will, like all other allowed claims, be addressed upon consummation of a chapter 11 plan. *See, e.g., In re Milham*, 141 F.3d at 423 (quoting *Orix Credit Alliance, Inc. v. Delta Resources, Inc. (In re Delta Resources)*, 54 F.3d 722, 729 (11th Cir. 1995) ("[A]n oversecured creditor . . . is entitled to receive postpetition interest as part of its claim *at the time of confirmation of a plan or reorganization . . .* ") (emphasis added); *Key Bank of N.Y. v. Harko (In re Harko)*, 211 B.R. 116, 119 (Bankr. 2nd Cir. 1997) (same). AIF cites no authority for the proposition that section 506(b) compels a debtor to pay interest to its secured creditors during the pendency of the case, nor can it for the simple reason that there is no such authority.<sup>2</sup>

10. In addition to seeking interest payments, AIF is also seeking to compel the Debtor to pay approximately \$15,000 per month in "late fees" that AIF alleges are accruing as a

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<sup>2</sup> The order authorizing the Debtors to obtain postpetition financing incorrectly listed AIF as one of the parties to whom the Debtors would make adequate protection payments. As AIF has implicitly acknowledged, however, that financing order was intended to apply only to mortgagees of real property. Moreover, the financing order contained a reservation of rights allowing the Debtors or any party in interest to challenge such payments. In light of the nature and value of the collateral at issue here and the lack of any risk of material diminution in the value of those assets over the short term, the payment of current interest as "adequate protection" is unwarranted.

result of the commencement of the bankruptcy case. AIF, however, has no entitlement to such fees. First, as with postpetition interest, even if AIF were entitled to such amounts, AIF would receive those fees as part of its claim but would not receive them during the pendency of the bankruptcy case. Second, AIF provides no explanation for the manner in which it calculated those "late fees," but their sheer magnitude -- the "late fees" are greater than the monthly interest payments owing under the Notes -- proves that these "late fees" are patently unreasonable.

11. Pursuant to section 506(b), an oversecured creditor's allowed secured claim may include only those "reasonable fees, costs, or charges provided for under the agreement under which such claim arose." 11 U.S.C. § 506(b). See *Mack Financial Corp. v. Ireson*, 789 F.2d 1083, 1084 (4th Cir. 1986) (holding that a creditor is entitled to collect late charges only if the creditor is oversecured and if the charges are reasonable). Late fees are not allowed when they are a penalty and do not reflect the secured creditors' expenses in handling late payments. See *In re Timberland Property Development, Inc.*, 136 B.R. 382, 386 (Bankr. D.N.J. 1992) (holding that "where a late charge does not reflect actual compensation to the creditor for the extra administrative expenses in handling the late payment, it will be deemed an unenforceable penalty"); *In re L.H.D. Realty Corp.*, 20 B.R. 722, 725 (Bankr. S.D. Ind. 1982).

12. Moreover, as in this case, where the Debtor is insolvent and any late fees awarded to the secured creditor would be paid at the expense of unsecured creditors, late fees should not be allowed. See, e.g., *In re Vest Assoc.*, 217 B.R. 696, 702 (Bankr. S.D.N.Y. 1998) (denying request for 15% default interest rate absent evidence that debtor was solvent). The late fees being sought by AIF vary between approximately 100% and 150% of the monthly interest payments due on the Notes. In light of the Debtors' financial situation, such fees are unreasonable and are not allowable. See *Timberland Property Development, Inc.*, 136 B.R. at 387 (5% monthly late charge was unenforceable penalty); *In re L.H.D. Realty Corp.*, 20 B.R. 722, 725 (Bankr. S.D. Ind. 1982) (same).

13. Lastly, as noted above, AIF may only receive postpetition interest and reasonable late fees if AIF is oversecured. AIF, however, provides no useful evidence regarding

the value of the Assets, such as an appraisal. Rather, AIF simply states that since Golden Bear paid approximately 5 times 1997 EBITDA for the business, the Assets must be worth at least 5 times this year's EBITDA. This is sheer sophistry. The price that Golden Bear paid for the business may not have reflected the actual value of the Assets in 1997, and it certainly does not reflect the current value of the Assets. (When Golden Bear acquired the Assets, its purchase price included not only the Assets, but also included goodwill and the right to enter into a lease for the property. Moreover, in the more than three and a half years that have elapsed since Golden Bear purchased the business, the value of many of the Assets has significantly diminished as a result of ordinary usage, and many of the Assets, such as golf balls, baseballs, tools, office furniture and office equipment may no longer be held by GBGC.<sup>3</sup> )

14. The bottom line, however, is that at this stage of these chapter 11 cases, the Court does not need to address the ultimate question of allowability of the interest or the "late fees", as section 506(b) does not entitle a secured creditor to collect such amounts during the pendency of the bankruptcy case. At the appropriate time and in connection with the claims resolution process, the Court can hold an evidentiary hearing to determine whether or not AIF is oversecured, and if so, the availability of the postpetition interest and "late fees" it is seeking.

#### Conclusion

For the reasons set forth above, the Debtors request that the Court deny the relief requested in the Motion.

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<sup>3</sup> The security agreement permits GBCC to dispose of the Assets in the ordinary course of business.

Dated: New York, New York  
October 2, 2000

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